S.B.Civil Second Appeal No.469/2006.

Purkha Ram.

vs.

Panna Lal.

Date : 25.4.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.BL Choudhary a/w Mr.KR Godara, for the appellant.
Mr.LD Khatri, for the respondent.

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Heard learned counsel for the parties.

Brief facts of the case are that the plaintiff/ respondent filed a suit for injunction alleging that there is a lane between the houses of the plaintiff and defendant. The plaintiff also placed on record the sketch map of the entire lane running between the two building lines. The plaintiff also produced copy of his sale deed by which he purchased his plot. The defendant also produced various documents. After appreciation of evidence, the two courts below held that the lane as alleged by the plaintiff is in existence between two houses and both the parties agreed to leave the land is also found proved from the documentary evidence. The

Courts also considered the oral evidence apart from the documentary evidence. However, the trial court also considered the Commissioner's report which was obtained in the proceedings under Order 39 Rules 1 and 2 CPC by appointing Commissioner under Order 39 Rule 7 CPC.

Since the trial court decreed the suit of the plaintiff vide judgment and decree dated 13.5.1998 and first appeal of the appellant/defendant was dismissed by the judgment and decree dated 26.9.2006, therefore, the appellant/defendant has preferred this second appeal.

Learned counsel for the appellant submitted that the two courts below committed error of law by considering the Commissioner's report which was not tendered in evidence in the suit and further despite the fact that the Commissioner was not produced as witness to prove the report. Not only this, the defendant filed counter claim in the suit and submitted that in fact, the plaintiff's encroached upon the land of lane, therefore, the plaintiff was not entitled to any relief of injunction. The core issue in the suit was the location of lane and the question involved was whether the plaintiff encroached upon the lane or the defendant encroached upon the lane and both the courts below failed to consider this aspect of the matter and

for that purpose, they should have looked into the basic point from where the gali starts in width.

Learned counsel for the appellant relied upon the judgment of the Bombay High Court delivered in the case of Govinda Raoji Katole vs. Ganpati Tukaramji Khanke reported in 2002 AIHC 688 wherein the Bombay High Court held that the order of the appellate court reversing the order of trial court by accepting evidence and map of surveyor as conclusive evidence was not proper and in this case, according to learned counsel for the appellant, two courts below considered the Commissioner's report and decided the suit accordingly against the appellant and committed grave error of law. The same view was taken by the Orissa High Court in the case of Smt. Bilasini Upadhyaya vs. Smt. Usharani Biswal reported in 2001 AIHC 4423.

I considered the submissions of learned counsel for the parties and perused the reasons given by the two courts below.

So far as the defendant/appellant's own case is concerned, there is a small platform, underground water tank constructed by the appellant on the land in dispute. The appellant's contention that the plaintiff has not left the land which he should have left for way and the plaintiff has encroached upon the land or

constructed the house exceeding its limit was concerned, that was pure question of fact. The contention of learned counsel for the appellant that the courts below have heavily based their judgments on the Commissioner's report appears to be by misreading of the judgment only because of the fact that two courts below before considering the Commissioner's report, considered the evidence of not only the plaintiff and defendant but also the statement of the defendant himself and considered the patta and thereafter reached to the conclusion that there is a lane between two houses and the construction raised by the defendant is on the land of lane. It is not a case where two courts below relied upon the Commissioner's report only. Even if the Commissioner's report is discarded, then the finding of the courts below on the issue remains unaffected.

In view of the above, I do not find any substantial question of law involved in this appeal. Consequently, this second appeal, having no merit, is hereby dismissed.

(PRAKASH TATIA), J.

S.Phophaliya